

STATE OF CALIFORNIA DEPARTMENT OF WATER RESOURCES

FINAL STATEMENT OF REASONS FOR ENCROACHMENT PERMIT REGULATIONS

Adopted pursuant to Water Code Sections 12899, *et seq.*

Including Summary of Comments, Department Response and Changes or Modifications

Notice File No. Z2013-1015-01

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I. Introduction.

The Initial Statement of Reasons for Rulemaking entitled "INITIAL STATEMENT OF REASONS FOR ENCROACHMENT PERMIT REGULATIONS," released to the public on October 25, 2013, is incorporated by reference as though set forth in its entirety herein. The Initial Statement of Reasons detailed the rationale for the proposed regulations. The Department's Notice of Proposed Rulemaking was published in the Notice Register on October 25, 2013. The public comment period expired on December 9, 2013. On December 9, 2013, a Public Hearing was held. The transcript of that hearing is attached as Attachment 1. Four entities submitted written comments, attached as Attachment 2. The comments are posted at <http://water.ca.gov/regulations>. One of those entities appeared at the public hearing and summarized its written comments.

Following its December 7, 2013, public hearing, the Department of Water Resources (DWR) made changes to the proposed California Code of Regulations, title 23, sections 600 through 630, which set forth standards for the issuance of an Encroachment Permit for access to the State Water Project (SWP) right-of-way and implement the Department's statutory authority to remove encroachments. At the January 15, 2014, meeting of the California Water Commission, the proposal to implement the changes was approved as an Action Item after making them available to the public for comment for a period of at least fifteen days. The Commission further provided that the Department shall consider such written comments as may be submitted during this period, shall make such modifications as may be appropriate in light of the comments received, and shall present the regulations to the Commission for further consideration if warranted.

This Final Statement of Reasons (FSOR) updates the initial statement of reasons by identifying and providing the rationale for the modifications made to the originally proposed regulations. The FSOR also contains a summary of the comments received on the proposed new regulation during the formal rulemaking process and the department's responses to those comments.

The department's response to the public comments are set out below. Based on the comments, the department has made several non-substantive changes to the regulations. In addition, the department added a new Section 608.3, establishing a notification requirement for changes in ownership of property on which an encroachment permit was obtained.

The changes are noted with strikeouts and additions indicated in underlined contrasting typeface color. Those changes are explained in this Final Statement of Reasons.

All regulatory documents for this rulemaking are available online at the following DWR website: <http://www.water.ca.gov/regulations/>. The full text, including changes and modifications, is available at this website as well.

Following the modification of the regulations by DWR, an additional "Notice of Public Availability of Modified Text and Availability of Additional Documents" and/or Information was served on interested parties and previous commentators on February 21, 2014, in accordance with Gov. Code section 11346.8(c), and made

available by way of the DWR web site. The deadline for public comments was march 10, 2014. No additional comments were received.

In accordance with the Government Code, section 11346.8, the proposed regulatory language is modified as follows:

II. Summary of Proposed Modifications.

1. Adding new section 608.3. Department Consent Required for Sale or Transfer of Encroachment Permit Interest. Duty to Notify Department.

Permittee shall provide written notice to the Department in the event of a sale or transfer of the Permittee's interest in property that is the subject of an Encroachment Permit. The right or interest included in an Encroachment Permit shall not pass by sale, transfer, assignment, or succession without written consent by the Department. Failure to notify the Department of the transfer will terminate the right or interest conferred by the Encroachment Permit, at which time the Department may take action to remove the encroachment as authorized by law and set forth in these Regulations.

Note: Authority: Section 12899.9, Water Code

Reference: Sections 12899.2 (b), 12899.2(c) & 12899.5 (b), Water Code

REASON: An Encroachment Permit is revocable at the discretion of the department. No matter what the mechanism is for transfer of the permitted interest, the department must be notified. Failure of the Permittee to provide this notice impairs the ability to effectively manage the area of the encroachment. In many instances where notice was not provided, staff consumed significant time attempting to locate the owner, without success, leaving a stranded encroachment that interferes with access, operations, or maintenance of the SWP. It is important to maintain up to date and accurate records of current ownership of the property included in the EP. This is a critical element, in the event the department is required to take action in the area of the encroachment. In addition, with a sale, transfer, dedication to and/or acceptance for operation and maintenance by a successor in interest, the department must ensure acceptance of and continued compliance with all the terms and conditions of the permit. If the department is unable to determine the identity of the owner, it will consider the encroachment abandoned and unauthorized and take action to remove it as authorized by law and these Regulations. In addition to the addition described above, various changes to the regulatory text have been made to improve clarity:

2. Addition to Section 602: Any person proposing an encroachment or any person who, as of the effective date of these regulations, has a non-permitted encroachment within the right-of-way acquired for the State Water Project, shall submit an application as found in Article 5, Section 610.1 of these regulations. This requirement shall not apply to any person that is exempt from permitting under Article 3, section 607 of these regulations or possesses an encroachment permit for authorized encroachments as

provided under Article 3, section 607 of these regulations.

3. Addition/deletion to Section 603.5: In accordance with Article 5, section 618 of these regulations, the Department may ~~summarily~~ deny an application if the Department determines that the proposed use may pose a threat to the physical integrity of the State Water Project or could interfere with the Department's rights with regard to access, inspection, repair, or the operation and maintenance of any State Water Project facility.

4. In section 607.1 for those with a pre-existing exemption: a non-substantive change in the wording from "~~requesting the exemption~~" to "asserting the exemption";

5. Additions to section 610.1:

- a. (a)(3)(E): Description and nature of proposed or existing encroachment, as-well-as its potential effect upon any State Water Project facilities, if any.
- b. (a)(3)(F): For a proposed encroachment, the estimated start and completion dates.

6. Sections 610.1 and 618.4: non-substantive changes to make all references to plan submittal consistent throughout the regulations.

7. Section 612.63, Subsection (c): delete the entire section and add the following:

- a) Pipelines carrying hazardous material or pollutants (oils, gasoline, sewage, contaminated waters, non-potable waters, etc.) shall be placed within a casing pipe throughout the SWP right of way. Pipelines transporting potable water or dry utilities do not require casing pipe except as identified in Section 612.63 (b) of these regulations.
- b) Pipelines attached to a bridge or an overchute shall be placed within a casing pipe through the aqueduct embankment and protective dikes.
- c) The applicant shall provide a 5/16-inch minimum thickness steel casing pipe, capable of containing 125% of the largest internal pressure of any carrier pipe within it. When the pipeline will not be excavated and is located a minimum of twenty-five (25) feet below SWP facilities, high density polyethylene (HDPE) may be used as the casing pipe material. The inside diameter of the casing pipe shall be a minimum of 4 inches larger than the maximum outside joint diameter of the carrier pipe. Unless the applicant receives prior approval from the Department, casing spacers will be required for all casing pipe applications. The ends of casing pipes shall be sealed with casing end seals (LINK SEAL or an equivalent approved by the Department). The casing shall be leak tested in the presence of a departmental inspector to verify that it is sealed. For information about Cathodic Protection Requirements for casing pipe, see Section 615, Article 7 of these regulations.

- d) Mortar-coated steel pipe without Cathodic protection can be used only in benign soil environments, soil environment which shall only be determined by the Department, with soil corrosivity analysis provided by the applicant.
 - e) The sleeve or casing for pipelines buried beneath the primary and secondary operating roads along the open canal embankments shall be fully concrete encased through the canal embankments, unless stamped engineering calculations verifying encasement is not required are submitted to, and approved by, the Department.
 - f) A minimum two (2)-inch inner diameter drain line shall be provided at the low end of the casing pipe and drain away from the aqueduct. The drain line shall terminate in a valve protected from vandalism and the drain valve shall be maintained in the open position. A three (3)-inch galvanized steel guard post (Schedule 80 or better) shall be installed adjacent to each drain line. The posts shall extend five (5) feet above the ground and eighteen (18) inches below ground. The bottom of the posts shall be embedded in at least one (1) cubic foot of concrete. A sign shall be installed containing the name of the owner/operator, contents of the pipeline, utility identification, and emergency contact telephone number.
 - g) Thermal elongation of the casing is a concern for utilities being attached to bridges or overchutes. Flexible single and expansion type coupling (such as Smith Blair Type 611 or Dresser Style 63, or equivalent) for the casing should be utilized to account for differential temperature range of 140 degrees Fahrenheit. The casing shall be mounted to the bridge or overchute by placing Teflon pads around the casing between the wall hanger brackets and U-bolts. The U-bolts should be installed with lock nuts at the top of the bracket and below the top angle and tightened to a point that still movement.
8. Section 612.72:
- Subsection (a): Add "be in compliance with or exceed".
 - Subsection (b)(1) and (b)(2): add "from the lowest sag point of the electric conductor or communication line".
 - Subsection (d): Add "For overhead electric conductor lines, a . . ."

9. Section 625.2, Subsection (c): add "including a registered agent designated with the California Secretary of State".

III. Public Comments And Response Of The Department.

1. Wheeler Ridge-Maricopa Water Storage District

COMMENT: Include in 607.1 and 608.2, categorical exemptions, the word "entities".

RESPONSE: Regulation section 600.3(q) defines "person" as including "other business entities" and "governmental entities". DWR declines to make the suggested revisions.

COMMENT: Section 605: Add exemption for anchors, markers, and monuments, or specify a minimum amount of soil involved (in “modifications to the existing soil”), such as “placement of excavated materials greater than five cubic yards”.

RESPONSE: Section 605 (a) repeats verbatim the statute, 12899(b). DWR is not inclined to modify the statute in this instance. DWR must control access to the right-of-way, for any reason, without restriction. With regard to “modifications to the existing soil” DWR does not want to create a minimum standard because conditions on the ground around the aqueduct and pipeline facilities may dictate the amount of permissible alteration without a permit. Any person wishing to alter the soil within the right-of-way is required to contact the department for permission. This will allow the department to provide guidance. If the activity or earth movement has a *de minimis* effect on the right-of-way, it is likely that no permit will be required.

COMMENT: Eliminate the requirement for a temporary entry permit for “visual inspections” and “aerial and ground surveys”.

RESPONSE: No temporary entry permit is required for “aerial” surveys, as no entry onto the right-of-way is required. With regard to inspections or other activities that will not alter the right-of-way land, a temporary entry permit is required. With the exception of certain designated areas where access is allowed without a permit, DWR is legally obligated to control the right-of-way surrounding the SWP facilities. As with any other property owner, permission is required for entry and activities on the right-of-way.

COMMENT: As with other commenters, a concern was expressed about pre-existing encroachments and updating or renewing an encroachment permit.

RESPONSE: Pre-existing permits, contracts, or other agreements between an encroacher and DWR are addressed in Section 12899.8 and Regulation sections 607.1 and 607.2. Section 12899.8 exempts those from obtaining an encroachment permit. However, Section 12899.8 and Regulation section 607.3 require that those holding an exemption submit plans for any proposed activity on the right-of-way to the department for review and comment. Further, if the encroachment is NOT authorized, DWR is obligated by Water Code section 12899.1 to seek its removal.

COMMENT: Word change to Regulation section 607.1 for those with a pre-existing exemption.

RESPONSE: DWR agrees with this comment and has made a non-substantive change in the wording from “requesting the exemption” to “asserting the exemption”.

COMMENT: Make the number of plans to be submitted consistent.

RESPONSE: DWR agrees with this comment and has made non-substantive revisions to

Regulation sections 610.1 and 618.4. Section 610.1 sets out the requirement for plan and supporting document submittals upon the initial application. Section 618.4, upon Department determination that it will issue the encroachment permit, will require additional sets of final plans to be submitted, one set that will be approved and returned to the applicant, and the others for distribution within DWR for retention and inspections.

COMMENT: The deposit for an encroachment permit is excessive.

RESPONSE: DWR conducted an internal audit of costs of the encroachment permit. In most cases, \$1,500 represents the minimum cost of staff review time and on-site construction inspection. The majority of encroachment permit costs far exceed that amount. Certainly, in the event the permit is withdrawn, the fee would be refundable and if the costs do not exceed \$1,500, the balance is refunded to the applicant.

2. CITY OF FAIRFIELD

COMMENT: Expressed concern about pre-existing encroachments.

RESPONSE: Pre-existing permits, contracts, or other agreements between an encroacher and DWR are addressed in Section 12899.8 and Regulation sections 607.1 and 607.2. Section 12899.8 exempts those from obtaining an encroachment permit. However, Section 12899.8 and Regulation section 607.3 require that those holding an exemption submit plans for any proposed activity on the right-of-way to the department for review and comment. Further, if the encroachment is NOT authorized, DWR is obligated by Water Code section 12899.1 to seek its removal.

COMMENT: Extend the period of removal under Regulation section 608.1 from sixty (60) to one hundred eighty (180) days for public entities.

RESPONSE: Water Code section 12899.5(c) requires the sixty-day notice. DWR has no ability to alter this time frame.

COMMENT: Establish a formal appeal process for unauthorized encroachments.

RESPONSE: Water Code section 12899.9 authorizes DWR to create regulations and also an administrative review/appeal process. Both are permissible, not mandated. DWR determined that there was no mechanism within the department for an appeal process and decided not to create one. Further, the notice of an unauthorized encroachment provides the encroacher with the opportunity to communicate with the department. Historically, DWR has been willing to work with the owner of an encroachment to facilitate abatement, or retroactively agree to the encroachment remaining in place, provided certain conditions are met. DWR would not seek removal of an encroachment that is the subject of a pre-existing agreement, but would need to make that determination upon submittal of supporting documentation. However, under Water Code section 12899, et seq., the Legislature authorized DWR to remove unauthorized encroachments. An

administrative appeal process would not serve the interests of preserving the safety, or integrity of the SWP facilities, or facilitate DWR's access for maintenance or operations.

3. TW TELECOM

COMMENT: Similar to other commenters, a concern was raised about how the department will deal with pre-existing encroachments. In this case, the commenter may be purchasing assets of a company or companies that include pre-existing encroachments.

RESPONSE: Pre-existing permits, contracts, or other agreements between an encroacher and DWR are addressed in Section 12899.8 and Regulation sections 607.1 and 607.2. Section 12899.8 exempts those from obtaining an encroachment permit. However, section 12899.8 and Regulation section 607.3 require that those holding an exemption submit plans for any proposed activity on the right-of-way to the department for review and comment. Further, if the encroachment is NOT authorized, DWR is obligated by Water Code section 12899.1 to seek its removal.

Historically, DWR has been willing to work with an encroachment permittee to facilitate abatement of an unauthorized encroachment, or retroactively agree to the encroachment remaining in place, provided certain conditions are met. DWR would not seek removal of an encroachment that is the subject of a pre-existing agreement, but would need to make that determination upon submittal of supporting documentation. If a company is purchasing the assets of another that include a permitted encroachment, it shall notify DWR of the acquisition pursuant to Regulation section 608.3. At that point, the department will work with the acquiring company to ensure continuation of the permit. However, an encroachment permit is, by its terms, revocable at the discretion of the department depending on the needs of the department. DWR must be notified of the new owner in the event action with regard to the encroachment must be taken.

COMMENT: A question was raised about DWR's involvement in environmental review of an encroachment permit application.

RESPONSE: Water Code section 12899.1(e) requires the applicant to obtain all permit clearances, specifically including CEQA. The department does not act as a lead or responsible agency with regard to CEQA. The application review process for a permit includes confirmation that all environmental clearances or permits are complete. If permit or environmental clearances have not been obtained, the application will be denied until such clearances have been obtained.

COMMENT: This commenter suggested several non-substantive edits to the regulations.

RESPONSE: In some cases, DWR believes the edits are an acceptable clarification of the regulations. In others, the suggested edits do not add to the existing regulations. The department has made the following non-substantive additions or deletions. These are

also indicated in red in the specific sections of the regulations that were changed.

1. Addition to Section 602. Requirement of the Public to Submit an Encroachment Permit Application

Any person proposing an encroachment or any person who, as of the effective date of these regulations, has a non-permitted encroachment within the right-of-way acquired for the State Water Project, shall submit an application as found in Article 5, Section 610.1 of these regulations. This requirement shall not apply to any person that is exempt from permitting under Article 36, section 607 of these regulations or possesses an encroachment permit for authorized encroachments as provided under Article 3, section 607 of these regulations.

RESPONSE: The department believes this is a valid clarifying change and not substantive to the intent or application of the affected section. This change will be made.

2. Addition to Section 603.5. Department's Authority to Deny an Encroachment Permit Application

In accordance with Article 5, section 618 of these regulations, the Department may summarily deny an application if the Department determines that the proposed use may pose a threat to the physical integrity of the State Water Project or could interfere with the Department's rights with regard to access, inspection, repair, or the operation and maintenance of any State Water Project facility.

RESPONSE: This is a clarifying, non-substantive change that the department will make.

3. Addition to Section 608.1. Unauthorized Encroachments

If the owner has not asserted a legal right consistent with Section 12899.8 of the Water Code or if any person who, as of the effective date of these regulations, is encroaching upon the Department's right-of-way and has not applied for an encroachment permit as provided in Article 5, section 610.1 of these regulations within sixty (60) days of receipt of the Department's notice, and has not removed or abated the use, activity, or encroachment to the Department's satisfaction within sixty (60) days, the encroachment may be abated or removed by the Department and the owner will be responsible for the cost and expense of the removal or abatement. A person who has applied for an encroachment permit and who was encroaching upon the Department's right-of-way as of the effective date of these regulations, may continue such use, activity or encroachment while the application is pending and during any administrative review or appeal of a Department decision or order that denies an

encroachment permit to the person.

RESPONSE: The department declines to make this change. The department believes this addition creates an unnecessary “grandfathering” exemption for unauthorized encroachments as of the effective date of the regulations. Water Code sections 12899.1(a) and 12899.1(f) make an encroachment without a permit unlawful and the department is authorized to compel its removal. The removal decision should not be mitigated by the owner of an unauthorized encroachment filing a permit application after notice by the department of the unauthorized encroachment. Regulation section 603.5 authorizes the department the discretion to deny a permit application upon determination that the encroachment may pose a threat to the physical integrity of the SWP or could interfere with the department’s rights with regard to access, inspection, repair, or the operation and maintenance of any SWP facility. The department staff will determine whether the encroachment is to be removed or not. If staff believe that an unauthorized encroachment can exist, providing certain conditions are met, staff will contact the encroacher and attempt to work out the conditions under which the encroachment may remain. However, the department has the discretion to seek removal of any unauthorized encroachment.

4. Additions to section 610.1. General Application Requirements

(a)(3)(E): Description and nature of proposed or existing encroachment, as-well-as its potential effect upon any State Water Project facilities, if any.

RESPONSE: The department will make this non-substantive change.

(a)(3)(F): For a proposed encroachment, the estimated start and completion dates.

RESPONSE: The department will make this non-substantive change.

(a)(6): Two (2) hard-copy sets and one (1) electronic (PDF format) set of plans, specifications, drawings, studies, specifications, analyses, and permits.

RESPONSE: The department declines this change. DWR staff needs not only the plans, but any supplemental specifications, drawings, studies, specifications, analyses and permits that may be required for the particular project application. Those are required for full consideration of the application. This will reduce staff review time and cost to the applicant.

(b): Construction and Work Plan Requirements. The requirements in this subsection b) shall apply to proposed encroachments only.

RESPONSE: Staff was not clear on the meaning of this addition. If it limits the

submission of plans, etc. only to proposed encroachments, the department declines this addition. With regard to unauthorized encroachments, all the requirements of Regulation section 601.1 may be required for the department to consider allowing the encroachment to remain on the right-of-way.

Add a new subsection (d) and renumber the existing (d) to (e).

d) No independent environmental review or evaluation by the Department shall be required for an existing encroachment as of the effective date of these regulations if the applicant demonstrates to the reasonable satisfaction of the Department that the encroachment has been previously evaluated and determined by the appropriate California government agency to be in compliance with applicable environmental laws, including CEQA.

RESPONSE: The department declines to make this change. If an existing encroachment was previously authorized, all environmental compliance, including the requirements under CEQA, were met. Should there be a question with regard to a continuing encroachment due to changes in ground conditions, submission of the applicable permits, or updates to those permits, would be required. Staff assumes, however, the comment relates to an unauthorized encroachment and the addition is, therefore, an unacceptable restriction to consideration of its removal. If staff discovers an unauthorized encroachment, it will be handled in accordance with the statute and these regulations.

5. Deletion to section 610.3(h). General Provisions of an Encroachment Permit

~~The permittee shall agree to release the State from responsibility or liability for any damages that may be caused to the encroachment by the use and operation of the SWP right-of-way and the Department's facilities.~~

RESPONSE: Staff does not agree to this change. An encroachment is permitted at the discretion of the department. The department is authorized by law to remove or alter an encroachment based on the needs of the department and its operations and an encroachment permit is revocable at the discretion of the department. Should alteration or removal of the encroachment be required, the department will initially attempt to contact the owner of the encroachment as required to work out a solution. However, the operations of the SWP are paramount to any rights of an encroachment permittee. Water Code section 12899.2(c) and Regulation section 610.5 require a permittee to remove or relocate the encroachment upon request by the department, "at the sole expense of the permittee." Section 12899.5(f) allows recovery of costs by the department in seeking removal of an encroachment.

6. Change to Section 612.63. Casing Requirements

Subsection (c): add “or HDPE (non-metallic)” to the casing requirement.

RESPONSE: Staff assumes this addition relates to an equivalency to the requirement of steel casing. Staff recognizes changes in the industry and that new products are created. Staff will consider an equivalent material for casings, and has modified this section as indicated above in the Summary of Proposed Modifications.

7. Changes to Section 612.72. Overhead Electrical and Communication Utilities

Subsection (a): Add “be in compliance with or exceed”.

RESPONSE: The department agrees to make this non-substantive change.

Subsection (b)(1) and (b)(2): add “from the lowest sag point of the electric conductor or communication line”

RESPONSE: The department agrees to make this non-substantive change.

Subsection (d): Add “For overhead electric conductor lines, a . . .”

RESPONSE: The department agrees to make this non-substantive change.

8. Change to Section 612.80. Utility Crossing Under the State Water Project's Roads

Subsection (d): Change the requirement of clearance from three to two feet.

RESPONSE: The department declines to make this change. Staff understands that the commenter's focus is on telecommunications cable, but this clearance is intended for all crossing utilities regardless of the classification of the utility. The prescribed standard establishes a consistent safe depth that will facilitate the operations and maintenance activities of DWR.

8. Changes to Section 625.1. Department's Authority to Remove Unauthorized Encroachments

Add “subject to section 608.1 of these regulations” and “unauthorized” to the first sentence.

RESPONSE: The reference to both “removal” section of Water Code section 12899.5 and 12899.6 is deliberate. The department has the statutory authority to control activities on the right-of-way, whether authorized by a permit or unauthorized. There have been occasions where a previously-authorized

encroachment may be in a location where it would interfere with operations, access or maintenance, and, therefore, must be removed. In the case of a permitted encroachment or unauthorized encroachment, the department is obligated to follow the requirements of these “removal” statutes.

9. Section 625.2. Department’s Unauthorized Encroachment Notification, General Information

Subsection (c): add “including a registered agent designated with the California Secretary of State”.

RESPONSE: The definition of “agent” is not included in Water Code section 12899, *et seq.*, or in the regulations. Staff refers to the general legal designation of “agent” as a person authorized to act on behalf of another. However, this phrase provides clarification, particularly to out-of-state businesses. The department agrees to make this non-substantive change.

4. AT&T

COMMENT: Are the proposed regulations (Water Code section 12899.3) consistent with the “franchise rights” under Public Utilities Code section 7901?

RESPONSE: Yes. Water Code section 12899.3 declares the Legislative intent that “no corporation has any franchise rights within the department’s right-of-way . . .” However, Public Utilities Code section 7901.1 permits time, place, and manner restrictions. The SWP is a critical public infrastructure and DWR is statutorily obligated to ensure the continuous operation, safety and integrity of the system. The regulations provide specifications for the conditions of use of the SWP right-of-way.

COMMENT: Do the regulations contemplate a change in the Department’s existing CEQA practices?

RESPONSE: No. Water Code section 12899.1(e) and Regulation 610.1(c) require the applicant to comply with all environmental permitting requirements. The department is not a lead or responsible agency with regard to environmental permitting as it relates to the encroachment permit.

COMMENT: As with other commenters, a concern was raised about pre-existing encroachments.

RESPONSE: DWR repeats the response from above: Pre-existing permits, contracts, or other agreements between an encroacher and DWR are addressed in Section 12899.8 and Regulation sections 607.1 and 607.2. Section 12899.8 exempts those from obtaining an encroachment permit. However, Section 12899.8

and Regulation section 607.3 require that those holding an exemption submit plans for any proposed activity on the right-of-way to the department for review and comment. Further, if the encroachment is NOT authorized, DWR is obligated by Water Code section 12899.1 to seek its removal.

These regulations to not supersede any previous practice of the department, except that into the future, the regulations will control encroachment permits and the applications for those permits.

COMMENT: The regulations will add significant costs to the permitting process.

RESPONSE: The regulations codify historical practices of DWR. There has always been a cost associated with review of plans, specifications and other supporting documentation of an application prior to issuing the permit, which have been historically paid by the applicant. Those costs are not anticipated to increase as a result of the regulations. Water Code section 128992(d) entitles DWR to charge for application processing and review.

IV. No Mandate Upon Local Agencies or School Districts (Gov. Code §11346.9(a)(2)).

Staff have determined that these regulations will have no impact on government entities or school districts as the statute and these regulations provide an exemption from obtaining an encroachment permit for local governmental entities along the SWP that have existing agreements with the department. Any school district is necessarily included in local governmental entities. The agreements were negotiated initially at least 50 years ago when the SWP was under construction, and new or modified agreements have been executed since then.

There will be no additional person-years needed to enforce the regulations because the regulations do not add additional requirements above what is already currently being required on a case-by-case contractual basis. Any additional work that may be required to enforce unauthorized encroachments will be absorbed by existing personnel within the department.

V. No Mandated Adverse Effects on Small Businesses (Gov. Code §11346.9(a)(5)).

Government Code sections 11342 et. seq. require DWR to consider any adverse effects on small businesses that would have to comply with a proposed regulation. DWR staff has concluded that because of the discretionary nature of the applicability of the regulations, there will be no mandatory impact on small businesses in the state. No person or entity is required to gain access to the right-of-way, so seeking an encroachment permit is a choice a person or business will make, and a cost related to obtaining the permit will be incurred only after making that decision.

VI. Reasonable Alternatives Have Been Considered (Gov. Code §11346.9(a)(4)).

DWR staff considered potential alternatives to the proposed regulations (namely, the no action alternative in most cases). DWR staff determined the proposed regulations are more appropriate than the alternatives considered, which would continue the practice of applying the standards in these regulations on a case-by-case basis. The department is obligated by law to operate and maintain the State Water Resources Development System. In allowing access, the department has, out of necessity, negotiated the terms and conditions of allowing encroachments and encroaching activities in the right-of-way, while preserving its obligation to ensure the integrity of the system, continued interrupted operations and maintenance obligations and ensure safety to the public. The proposed regulations codify past practice so that all permit applicants are advised of the requirements that must be met.

No alternative considered by the agency would be more effective in carrying out the purpose for which the regulation is proposed or would be as effective as or less burdensome to affected private persons than the proposed regulation.

VII. No Conflict With Other Regulatory Schemes.

These regulations do not create a conflict with any applicable Federal Law. The Department of Water Resources jointly operates certain portions of the Water Resources Development System with the Federal Bureau of Reclamation. The Bureau of Reclamation does not have a set of regulations or statutes that conflict with the principles set forth in Water Code section 12899, or these regulations. With regard to the requirements set forth in these regulations, the Bureau of Reclamation defers to the department for operations and maintenance control.

VIII. No Changes In Laws Or Effects Since The NOPA.

There have been no changes in applicable laws or to the effect of the proposed regulations from the laws and effects described in the Notice of Proposed Action.